



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126

Albany NY 12212-5126

DECISION OF THE BOARD

Mailed and Filed: JULY 12, 2023

IN THE MATTER OF:

Appeal Board No. 604255

PRESENT: MARILYN P. O'MARA, MEMBER

The Department of Labor issued the initial determinations (including June 15, 2018, and June 22, 2018), to HOME CARE SERVICES, INC., DBA GRISWOLD HOME CARE OF NORTHERN ROCHESTER NY (hereinafter "Griswold")

holding Griswold liable for tax contributions effective 2015 based on remuneration paid to (hereinafter the "claimant") and to all other

individuals similarly employed as home health aides or home care aides (hereinafter "caregivers"). The claimant was credited with remuneration from Griswold regarding the claim for benefits effective January 23, 2017. (Combined Appeal Board Nos. 604255 & 604256 and & 318-03592.)

The Department of Labor issued the initial determinations (including February 23, 2018, and June 22, 2018) to Stuart Norris (hereinafter "client-Norris") holding that he is not the true employer of the claimant. The claimant was not credited with remuneration from client-Norris regarding the claim for benefits effective January 23, 2017. (Combined Appeal Board Nos. 604257 & 604258 and 318-03593 & 318-03474.)

Griswold requested a hearing, contending that the claimant and all other individuals similarly situated performed services as independent contractors.

The Administrative Law Judge held telephone conference hearings at which all parties were accorded a full opportunity to be heard and at which testimony

was taken. There were appearances by the claimant and on behalf of Griswold, client-Norris, and the Commissioner of Labor. By combined decisions filed November 16, 2018, the Judge sustained the initial determinations holding Griswold liable for tax contributions and holding client-Norris not to be the true employer.

Griswold appealed the Judge's combined decisions to the Appeal Board.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: Griswold¹ is a Licensed Employment Agency registered with the NYS Department of Labor.² Griswold maintained on its platform (ClearCare³) a registry of individual caregivers and clients for in-home companionship and homemaking services.

Griswold found caregivers through referrals or by soliciting on ZipRecruiter. Griswold provided interested candidates with an average market payrate for caregivers to decide if the potential payrate would be satisfactory. For candidates who remained interested, Griswold required the candidate to complete an application form, participate in a telephone interview, submit documentation (e.g., references and certifications), undergo verification of the caregiver's credentials and certifications, take a 25-question skill test for minimum competency of a certified nursing assistant, file for and obtain a Federal Employer Identification Number (FEIN), participate in an in-person interview, and undergo a background check at the expense of the caregiver. Approximately five to ten percent of the applicants satisfied the above requirements. The platform's registry contained, for the most part, the above onboarding information for caregivers.

For clients, the platform's registry included the type of caregiver sought, the services sought, the intended work schedule, the hourly payrates for the caregiver fee and office fee, etc. Generally, Griswold conducted an in-home interview with a potential client to ensure a "safe" home environment, and to discuss the requested service - the client's needs, desires, service schedule, etc. Griswold covered the "total cost of care", which includes the office fee payable to Griswold and the fee payable to the caregiver. To that end, Griswold provided the client with the average fees charged by caregivers. For example, if the total cost of care is \$18 per hour, the caregiver fee is \$13 per hour and Griswold's office fee is \$5 per hour.

On July 15, 2016, intending to engage Griswold to provide 24-hour care for his elderly father upon returning home from his nursing home rehabilitation, client-Norris executed Griswold's Client Service Agreement, which provides, in part, as follows:

- * Griswold will refer one or more screened Caregiver to Client for his/her/their consideration to provide companionship or homemaking services ("Service") to Client. [§ 1]
- * Griswold will thoroughly screen Caregivers. [§ 6]
- * Griswold will use the information provided by Client in its efforts to refer Caregivers whose credentials and experience meet Client's stated preferences and specifications. [§ 6]
- * Griswold shall provide Client with 1) continued access to a thoroughly screened pool of Caregivers, and 2) billing supplies. [§ 6]
- * Client has received from Griswold a document called "Office Fees and Average Fees Charged By Caregiver" showing (a) the Office Fees charged by Griswold for the screening and referral services it provides. Office Fees are defined as a stated amount per hour of Service that a referred Caregiver provides for Client, are set by Griswold; and (b) the average caregiver fees generally charged by caregivers registered with Griswold to assist Client in establishing the hourly rates for Caregivers selected by Client. [§ 2]
- * Client shall, weekly, pay Griswold the Office Fees with respect to the number of hours of Service a Caregiver performs for Client during the previous week. Client shall complete a billing slip with the Caregiver setting forth the number of hours of Service such Caregiver performed for Client. [§ 3]
- * Client shall, weekly, pay Caregiver separately for the Services that Caregiver provides for Client at the rate Client sets with the Caregiver. [§ 3]
- * Griswold will thoroughly screen potential Caregivers and will use the information provided by Client in its efforts to refer Caregivers whose credentials and experience meet Client's stated preferences and specifications. [§ 6]

* Griswold will provide Client with (1) continued access to a thoroughly screened pool of Caregivers, and (2) billing supplies. [§ 6]

* Griswold has neither a right to terminate a relationship between Client and a Caregiver, nor monitor, direct, supervise, train, or discipline the referred Caregivers. [§ 6]

* Client is responsible for determining: 1) which caregiver Client will engage to provide Services; 2) when that Caregiver will begin and end Services; 3) caregiver preferences; 4) communicating those preferences to Griswold; 5) how and in what manner the Services are provided; 6) the hours of Service; and 7) Caregiver payrates. [§ 6]

* Client may discontinue the services of a referred Caregiver and request the referral of a different Caregiver, no questions asked. [§ 6]

* During the term of this Agreement and for one year after its termination, Client will pay Office Fees to Griswold with respect to any Service that Client receives from any referred Caregiver. If Client breaches this part of the Agreement or wishes to terminate this Agreement and privately retain any referred Caregiver, Client will pay Griswold the sum of Five Thousand Dollars (\$5,000,00) per Caregiver. [§ 7]

Griswold required client-Norris to acknowledge the receipt of several Griswold forms, including New York - How To File A Complaint (reporting adult abuse), and HIPAA Authorization for Release of Health Information. Of the many general forms used by Griswold, one form is the Potential Client Inquiry Information form that outlines various categories like the current condition of the client, the client's goals and desired services, the client's intended start date, etc.

The platform matched the client's specifications to the registered caregivers. To these identified caregivers, the platform sent a combination of text and email messages of the assignment, which could include a client's medical condition, requested services (e.g., "homemaking or light meal preparation"), the proposed work schedule, and the rate of pay. If the assignment was acceptable, a caregiver may affirmatively respond to the message.

Griswold provided the caregiver with additional client-contact information for an in-home meeting. Griswold generally attended this meeting. Once a client

and a caregiver mutually approved of each other, the client and/or the caregiver provided Griswold with updated information, including the confirmed work schedule and start date. Often, clients requested Griswold to send caregivers without meeting them. Griswold updated the caregiver's schedule on the platform's "scheduler" so that the caregiver was not offered future assignments that may conflict with the accepted assignment.

The claimant applied to work as a caregiver and complied with the foregoing onboarding requirements. On August 17, 2016, the claimant executed Griswold's Caregiver Agreement that provides, in part, as follows:

* Griswold operates a "registry referral service that recruits, thoroughly screens, registers and refers Caregivers" to provide "homemaking and companionship services" ("Services") to its Clients. [Preamble]

* Caregivers must "satisfy Griswold's background-screening and credential verification protocol." [Preamble]

* Clients will determine whether to engage Caregivers, what Services and hours are required, and whether the Services caregivers perform are satisfactory. [§

2]

* Client will pay Caregivers directly. [§ 3]

* Caregivers must provide Griswold with the number of hours worked each week for each Client. [§ 3]

* Caregivers are solely responsible for keeping track of the number of hours worked and of all income Caregivers receive from Clients, as well as for billing and collecting fees from clients. [§ 3]

* Griswold is entitled to its separate fee from Clients with respect to the Services that Caregivers perform for a Client ("Office Fees") for all Clients referred by Griswold during the term of this Agreement and for one (1) year thereafter (the "Office Fee Period"), which Caregivers agree to pay Griswold one-thousand dollars (\$1,000.00) in damages for each violation. [§ 6]

The Caregiver Agreement contains no requirement to purchase liability insurance.

When the claimant came on board, Griswold had in mind client-Norris's father, who was at a nursing home but set to return home. Griswold arranged and escorted the claimant and other caregivers to visit the nursing home to meet with client-Norris, and his brother and father. Griswold provided the claimant with written information containing the client's contact information, the payrate, the start date, and the work schedule. Griswold also provided the claimant with a written list of the job duties, which included cleaning requisite areas, changing diapers, assisting with medication, and transporting, entertaining, light housekeeping, bathing, etc.

Griswold scheduled the caregivers and provided the initial work schedules to the client and caregivers alike. Client-Norris had no responsibility with scheduling caregivers. The claimant worked for about 90 hours per week - some 16-hour and 24-hour shifts. Any calls to client-Norris of a caregiver's inability to report to work were directed to Griswold, which arranged for a substitute. If the claimant needed to adjust a work shift, the claimant notified Griswold. The claimant altered the schedule among other Griswold caregivers or Griswold took responsibility to find and send a substitute. Occasionally, Griswold's president/officer provided services as a substitute. On one occasion, the claimant was unable to take the time off when Griswold was unable to procure a substitute. If a caregiver didn't show up for the next shift, Griswold instructed the claimant to stay until the next caregiver arrived. If client-Norris changed the work schedule, the claimant needed to advise Griswold. Most often, the client advised Griswold of service changes that included stopping service because of a client's hospitalization or resuming service because of a client's return home. Griswold passed along such information to the claimant. Griswold frequently revised the work schedule and emailed the updated schedules to the relevant individuals.

Griswold had numerous text message and email communications with the client regarding various topics, including the caregivers' hourly rate of pay, work shifts and schedules, travel concerns, reliability and dedication to provide services, etc. On one occasion, Griswold reminded client-Norris of the importance for the caregivers to use the triplicate timeslip forms, to collect from the caregiver the timeslips, to total the hours worked each week, to determine the caregiver's weekly pay and Griswold's weekly office fee, and to submit to Griswold a copy of the timeslip with the client's office fee payment; and further reminded that many blank timeslips had been provided to the client and to the caregivers. On another occasion, Griswold provided

client-Norris with full details of a new caregiver, which included the caregiver's contact information, prior experience, availability for live-in work, skills, certifications (e.g., Home Health Aide or Personal Care Assistant), and education. On yet another occasion, Griswold and client-Norris communicated to confirm a caregiver's work shift and hourly payrate.

Client-Norris had questioned Griswold when to expect to receive copies of the caregivers' workers' compensation insurance and other insurance policies. Griswold advised client-Norris that the caregivers "have committed to having their own liability insurance ASAP, this is one of the requirements in order to be listed on my registry. Once they get it, they will provide you with the certificate." Pursuant to the Certificate of Liability Insurance, Griswold's coverage included "any individual caregiver ... performing services for a [referred] client ..., regardless of the caregiver status as an employee or independent contractor and regardless of whether such caregiver is operating under the control of the named insured ... or whether the named insured is legally responsible for any liability arising out of such acts or omissions." The claimant was not required to purchase any type of insurance.

Client-Norris did not address concerns with the claimant, and always communicated with Griswold demanding any issues to be fixed. Griswold occasionally set up and attended on-site meetings with the client and the servicing caregivers to settle any type of "infighting" and/or to "mitigate future issues and problems". If a client was not satisfied with a caregiver for any reason, Griswold replaced the caregiver. Griswold frequently communicated with the claimant regarding client concerns. On one occasion, Griswold instructed the claimant not to argue with other coworkers. After this meeting, per email to client-Norris, Griswold outlined several alternative plans of action to resolve the conflicts, which included finding one or more replacement caregivers before "firing" one or more caregivers. There were many caregivers that Griswold "brought to the home that [client-Norris] never met or even saw their resume". Not all caregivers were interviewed by client-Norris.

Occasionally, based on certain negative feedback from a client about a caregiver's conduct, Griswold placed a caregiver into the registry's inactive list to prevent future referrals. In or about January 2017, Griswold instructed claimant not to return to client-Norris who no longer needed claimant's services. Subsequently, Griswold offered the claimant a potential new client (Wilford). At Griswold's office, about six caregivers, including

the claimant, met with client-Wilford. Griswold provided the caregivers with a written list of job duties and a work schedule that outlined each of the caregivers' work shift. The claimant commenced working for client-Wilford. Any changes to the work schedule needed to be approved by Griswold. Griswold required that the claimant not work over 40 hours per week for client-Wilford. Griswold frequently provided updated work schedules due to changes.

Griswold provided the claimant and clients with billing supplies, including bank envelopes and triplicate timeslip forms. The claimant completed the mandatory timeslips weekly. The timeslips incorporated, among other things, the mandatory FEIN, and the hourly rates for the caregiver and office fee (\$13 and \$5, respectively). Each week, the clients made two payments - one to the caregiver for service, and one to Griswold for the office fee - each payment accompanied by a completed timeslip. In or about February 2017, Griswold engaged a third-party payroll service provider (PSP). The caregiver called the PSP upon arrival and departure daily; the PSP emailed the clients weekly to verify the hours; the clients approved the hours weekly to authorize the payment withdrawal from the clients' bank accounts; and the PSP made separate weekly payments to the caregiver and Griswold. The claimant was provided no reimbursement for expenses, and the weekly payments were without deductions for withholdings. Client-Norris provided the claimant with an IRS 1099 form. Client-Wilford did not provide an IRS 1099 form to the claimant.

OPINION: The credible evidence establishes that Griswold exercised, or reserved the right to exercise, sufficient supervision, direction, or control over the services of the claimant to hold an employment relationship. Here, Griswold advertised for caregivers who underwent an extensive screening process, which included interviews, references, skills test, and background check. Griswold maintained a registry of caregivers and clients, from which it matched and selected caregivers to meet clients' needs, then offered the caregivers the clients that Griswold previously interviewed. Caregivers who accepted work were provided a written list of the job duties. Griswold scheduled the caregivers and provided the initial and updated work schedules, and required caregivers to notify Griswold of any work schedule alterations for it to find and send substitute caregivers. Griswold fielded complaints and/or replaced each caregiver pursuant to its client's wishes, and conducted meetings to help resolve disputes among its caregivers. Griswold prohibited the caregiver from leaving a client until a relief caregiver arrived, and on one occasion prohibited the claimant from taking time off due to Griswold's inability to find a substitute. Griswold supplied and mandated the completion

and submission of detailed timeslips on a weekly basis, and mandated that caregivers be paid weekly. Significantly, by providing caregivers and clients with the average market payrate for caregivers, Griswold effectively set the hourly payrate. Moreover, one year post termination of either the Client Service Agreement and the Caregiver Agreement, Griswold prohibited a referred caregiver from working for a referred client without payment of a large penalty. These circumstances have more indicia of supervision, direction, or control than in similar cases involving home health aides where the Court found an employer-employee relationship. See *Matter of Loughran* (Foley Nursing Agency, Inc.), 258 AD2d 857 (3d Dept 1999); *Matter of Collins* (County of Steuben), 165 AD2d 940 (3d Dept 1990); and *Matter of Whyte* (Good Care Nursing Agency Inc.), 132 AD2d 758 (3d Dept 1987).

Although the caregivers receive payment directly from the clients, Griswold is paid a specific hourly amount for its office fee based on every hour of the caregiver's services (*Matter of Loughran* [Foley Nursing Agency, Inc., 258 AD2d 857 [3d Dept 1999]]). Furthermore, possession of a FEIN, which is commonly used by employers for the purpose of reporting taxes, is not equivalent to a legal entity filed with the New York Department of State, Division of Corporations (Appeal Board No. 588264 & 588266). Notably, sufficient supervision, direction, or control may warrant even a business entity owned and operated by an individual to be held as an employee (*Matter of Thomas* [Geneva Consulting Group], 134 AD3d 1199 [3d Dept 2015]; and *Matter of G. Fried Westbury Inc.*, 239 AD2d 677 [3d Dept 1997]). Thus, we find and conclude that these arrangements to have the client make the payment directly to the caregiver, and to mandate a caregiver to obtain a FEIN, are mere ineffectual tactics to avoid tax liability and are not dispositive.

Next, Griswold contends that its clients directed and supervised the caregivers. However, where Griswold communicated extensively with the client regarding various issues, we conclude that Griswold, through the clients as its agents, "supervised and exercised control over the results produced by the [caregivers] as well as the means employed to achieve those results so as to establish" Griswold as the true employer of the claimant and other caregivers. *Matter of Thomas* (Geneva Consulting Group), 134 AD3d 1199 (3d Dept 2015). See also, *Matter of Victor* (Aubrey Organics, Inc.), 116 AD3d 1327 (3d Dept. 2014); *Matter of Rios* (La Prairie, Inc.), 279 AD2d 681 (3d Dept 2001); *Matter of Arkwin Industries, Inc.*, 208 AD2d 1022 (3d Dept 1994); *Matter of Santamore*, 193 AD2d 849 (3d Dept. 1993); *Matter of Lucas* (Yves Saint Laurent Parfums Corp.), 161 AD2d 993 (3d Dept 1990); *Matter of Nurse Care Registry, Inc.*, 154

AD2d 804 (3d Dept 1989); and Matter of Furno (Panasonic Co.), 102 AD2d 937 (3d Dept 1984).

Finally, we credit the claimant's testimony that caregivers were not required to purchase liability insurance. Significantly, not only does the Caregiver Agreement contain no such provision, but Griswold produced no evidence of such insurance having been submitted by a caregiver. Moreover, Griswold's liability insurance covered "any individual caregiver ... regardless of the caregiver status as an employee or independent contractor."

Under the totality of the circumstances, the claimant and all other caregivers similarly situated were employees of Griswold, who were in covered employment for purposes of unemployment insurance. Accordingly, Griswold's objection should be overruled and the initial determination holding Griswold liable for unemployment insurance tax contributions should be sustained.

DECISION: The decision of the Administrative Law Judge is affirmed.

The initial determinations (including June 15, 2018, and June 22, 2018), holding Griswold liable for tax contributions effective 2015 based on remuneration paid to the claimant and to all other individuals similarly employed as caregivers, are sustained.

Griswold is liable with respect to the issues decided herein.

The claimant is deemed an employee of and is credited with remuneration from Griswold.(Combined Appeal Board Nos. 604255 & 604256 and A.L.J. Case No. & 318-03592.)

The initial determinations (including February 23, 2018, and June 22, 2018), holding Stuart Norris not to be the true employer of the claimant, is sustained.

Stuart Norris is not liable with respect to the issues decided herein.

The claimant is not deemed an employee of and is not credited with remuneration from Stuart Norris.(Combined Appeal Board Nos. 604257 & 604258 and 318-03593 & 318-03474.)

MARILYN P. O'MARA, MEMBER

1 Frank & Mary Pettinaro Home Care Services, Inc., DBA Griswold Home Care of Northern Rochester NY (<https://www.griswoldhomecare.com/northern-rochester>), is an independently owned and operated franchisee of Griswold International, LLC, DBA Griswold Home Care (<https://www.griswoldhomecare.com>).

2 <https://dol.ny.gov/employment-agencies>; and
<https://dol.ny.gov/system/files/documents/2023/06/employmentagencieslisting.pdf>

3 ClearCare, a technology platform for non-medical home-based care, may have been acquired by WellSky Personal Care in 2019.

<https://wellsky.com/clearcare-is-now-wellsky-personal-care/#:~:text=WellSky%20acquired%20ClearCare%20in%202019,acute%2C%20and%20community%20care%20continuum>.

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